

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**THE PENSION COMMITTEE OF THE  
UNIVERSITY OF MONTREAL  
PENSION PLAN, *et al.*,**

**Plaintiffs,**

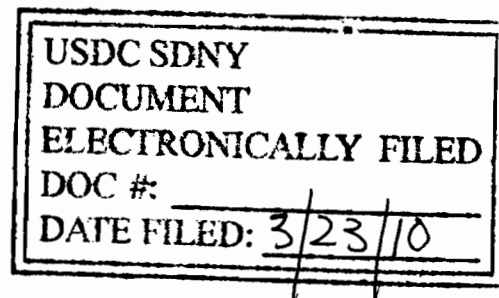
**- against -**

**BANC OF AMERICA SECURITIES,  
LLC, CITCO FUND SERVICES  
(CURACAO) N.V., THE CITCO GROUP  
LIMITED, INTERNATIONAL FUND  
SERVICES (IRELAND) LIMITED,  
PRICewaterhouseCOOPERS  
(NETHERLAND ANTILLES), JOHN W.  
BENDALL, JR., RICHARD GEIST,  
ANTHONY STOCKS, KIERAN  
CONROY, and DECLAN QUILLIGAN,**

**Defendants.**  
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**MEMORANDUM  
OPINION AND ORDER**

**05 Civ. 9016 (SAS)**



**SHIRA A. SCHEINDLIN, U.S.D.J.:**

**I. INTRODUCTION AND BACKGROUND**

A group of investors brings this action to recover losses stemming from the liquidation of two British Virgin Islands based hedge funds in which they held shares: Lancer Offshore, Inc. (“Lancer Offshore”) and OmniFund Ltd. (“OmniFund”) (collectively, the “Lancer Funds”). These investors purchased

shares in the Lancer Funds between approximately 1998 and August 2002. The action was filed on February 12, 2004 in the Southern District of Florida and transferred to this Court on October 25, 2005 as a result of defendants' motion to transfer venue.<sup>1</sup> Although the action involves the claims of ninety-six plaintiff investors, on February 1, 2008, I ordered that the case would proceed initially on the claims of twenty plaintiffs ("Plaintiffs"). The only remaining defendants are the Lancer Funds' former administrator, Citco Fund Services (Curacao), N.V. ("CFS-Curacao"), its parent company, The Citco Group Limited, and former Lancer Offshore directors who were officers of CFS-Curacao (collectively, the "Citco Defendants").

In deciding the Citco Defendants' motion for summary judgment, I held that Plaintiffs failed to state a claim for fraud with respect to investments made prior to June 2001 because Plaintiffs had not shown that the Citco Defendants possessed the requisite scienter prior to that date.<sup>2</sup> I subsequently

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<sup>1</sup> See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, — F. Supp. 2d —, 2010 WL 184312, at \*8 (S.D.N.Y. 2009).

<sup>2</sup> See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 592 F. Supp. 2d 608, 642 (S.D.N.Y. 2009) ("Summary judgment is granted to the Citco Defendants on plaintiffs' Section 10(b) claims based on purchases of shares made before June 2001 because plaintiffs have not shown that the Citco Defendants possessed scienter prior to this date."); *id.* ("Summary judgment is granted to the Citco Defendants on plaintiffs' common law fraud

extended that ruling to Plaintiffs' breach of fiduciary duty claims on the ground that those claims are "fraud-based."<sup>3</sup> In preparation for trial, the Citco Defendants have made a motion, based on those holdings, requesting that I apply New York's three-year statute of limitations for injuries to property,<sup>4</sup> and not its six-year statute of limitations for actions based on fraud,<sup>5</sup> to Plaintiffs' negligent misrepresentation claims relating to investments made prior to June 2001. For reasons discussed below, the Citco Defendants' motion is granted.

The Citco Defendants omitted to specifically request in their motion that Plaintiffs' relevant negligent misrepresentation claims be dismissed pursuant to a ruling that the three-year statute of limitation applies. However, under New York law, negligent misrepresentation claims accrue "on the date of the alleged

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claims based on purchases made before June 2001 because plaintiffs have not shown that the Citco Defendants possessed scienter prior to that date."); *id.* ("Summary judgment is granted to the Citco Defendants on plaintiffs' aiding and abetting claims for purchases made prior to June 2001 because they have not shown that the Citco Defendants possessed actual knowledge of the alleged scheme prior to this date.").

<sup>3</sup> See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 617 F. Supp. 2d 216, 226 (S.D.N.Y. 2009).

<sup>4</sup> See C.P.L.R. § 214(4).

<sup>5</sup> See *id.* at § 213(8)

misrepresentation which is relied upon by the plaintiff.”<sup>6</sup> Accordingly, all of Plaintiffs’ negligent misrepresentation claims arising from representations made prior to February 12, 2001 are hereby dismissed.

## II. APPLICABLE LAW

Under New York law, the appropriate statute of limitations for negligent misrepresentation claims depends on the nature of the claim. If the negligent misrepresentation claim arises from facts that also state a cause of action for fraud, New York courts apply the six-year statute of limitations provided by section 213(8) of the New York Civil Practice Law and Rules (“C.P.L.R.”) for actions “based upon fraud” so long as the allegation of fraud is not ancillary to the negligent misrepresentation claim.<sup>7</sup> If the negligent misrepresentation claim does

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<sup>6</sup> *Doss, Inc. v. Christie’s Inc.*, No. 08 Civ. 10577, 2009 WL 3053713, at \*3 (S.D.N.Y. Sept. 23, 2009) (quoting *Fandy Corp. v. Lung-Fong Chen*, 691 N.Y.S.2d 572, 573 (2d Dep’t 1999)) (collecting cases)

<sup>7</sup> *See* C.P.L.R. § 213(8). *See Sotheby’s Fin. Servs., Inc. v. Baran*, No. 00 Civ. 7897, 2003 WL 21756126, at \*10 (S.D.N.Y. July 29, 2003) (“Under New York law, claims for negligent misrepresentation based on fraud are governed by a six-year statute of limitations period.”); *Von Hoffman v. Prudential Ins. Co. of Am.*, 202 F. Supp. 2d 252, 263 (S.D.N.Y. 2002) (“In New York, a claim for negligent misrepresentation based on the same facts as a claim for fraud is governed by the six-year statute of limitation for fraud under C.P.L.R. § 213(8).” (citations omitted)); *Calcutti v. SBU, Inc.*, 224 F. Supp. 2d 691, 701 (S.D.N.Y. 2002) (“In New York, a negligent misrepresentation claim that is based on the same factual situation as a fraud claim is subject to a six-year statute of limitations.” (citations omitted)); *Fromer v. Yogel*, 50 F. Supp. 2d 227, 242 (S.D.N.Y. 1999) (“I hold that Plaintiffs’ [negligent misrepresentation] claim is timely under the six-year statute

not state a cause of action for fraud, New York courts sometimes apply the six-year statute of limitations provided by section 213(1) for actions “for which no limitation is specifically prescribed by law.”<sup>8</sup> Other times, however, courts have applied the three-year statute of limitations provided by section 214(4) for actions “to recover damages for an injury to property.”<sup>9</sup>

### III. DISCUSSION

At the summary judgment phase, Plaintiffs failed to demonstrate that there was a genuine issue of material fact as to whether the Citco Defendants had the requisite scienter to support their fraud claims relating to investments made prior to June 2001. Without proving scienter, which is a necessary element of fraud,<sup>10</sup> Plaintiffs cannot logically argue that their negligent misrepresentation

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of limitations provided in CPLR § 213(8). This holding is limited to those instances where negligent misrepresentation is alleged according to facts that also state a cause of action for fraud.”); *County of Ulster v. Highland Fire Dist.*, 815 N.Y.S.2d 303, 306 (3d Dep’t 2006) (“Finally, if the facts underlying a cause of action for negligent misrepresentation also state a cause of action for fraud, it too must be brought within six years of the offending conduct.” (citation omitted)).

<sup>8</sup> C.P.L.R. § 213(1). See *Asbeka Indus. v. Travelers Indemnity Co.*, 831 F. Supp. 74, 80 (E.D.N.Y. 1993); *Milin Pharmacy, Inc. v. Cash Register Sys., Inc.*, 570 N.Y.S.2d 341, 341 (2d Dep’t 1991).

<sup>9</sup> C.P.L.R. § 214(4). See *Colon v. Banco Popular N. Am.*, 874 N.Y.S.2d 44, 44 (1st Dep’t 2009).

<sup>10</sup> See *Chanayil v. Gulati*, 169 F.3d 168, 171 (2d Cir. 1998) (“Under New York Law, the elements of common law fraud are a material, false



claims relating to those investments state a cause of action for fraud.<sup>11</sup> To the extent that Plaintiffs are able to succeed on their negligent misrepresentation claims relating to investments made prior to June 2001, those claims will have to be based on something other than fraud.

Plaintiffs cite two cases – *Milin Pharmacy, Inc. v. Cash Register System, Inc.* and *Calcutti v. SBU, Inc.* – for the contrary proposition that their negligent misrepresentation claims still sound in fraud even though their fraud claims were dismissed for lack of scienter.<sup>12</sup> However, neither case supports this proposition. In *Milin Pharmacy*, a New York appellate court upheld a trial court’s application of a six-year statute of limitations to a negligent misrepresentation claim even though it also determined that the trial court had properly dismissed

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representation, *an intent to defraud thereby*, and reasonable reliance on the representation, causing damage to the plaintiff.” (emphasis added) (quotation marks and citation omitted)). Constructive fraud, unlike actual fraud, does not require an intent to deceive. However, as Plaintiffs have not alleged a claim for constructive fraud, I do not pass on whether a negligent misrepresentation claim sounding in *constructive* fraud is subject to a six-year statute of limitations.

<sup>11</sup> See *County of Ulster*, 815 N.Y.S.2d at 306. Cf. *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009) (holding that plaintiff’s breach of fiduciary duty claim was not essentially a fraud action subject to section 213(8) because plaintiff did not allege justifiable reliance).

<sup>12</sup> See Plaintiffs’ Memorandum of Law Regarding the Statute of Limitations Applicable to Plaintiffs’ Negligent Misrepresentation Claims at 2-3.

plaintiff's fraud claim for failing to plead with the required particularity.<sup>13</sup>

However, the appellate court cited section 213(1), not section 213(8), in support of that assertion.<sup>14</sup> As discussed below, section 213(1) is not applicable to Plaintiffs' claims.

In *Calcutti*, a federal district court applying New York law also held that the six-year statute of limitations applied to a negligent misrepresentation claim even though plaintiff failed to plead his fraud claim with particularity.<sup>15</sup> However, the court did not discuss the interplay of the fraud and the negligent misrepresentation claims, granted plaintiff the opportunity to replead his fraud claim, and did not discuss whether the six-year statute of limitations would still apply if the fraud claim was ultimately dismissed with prejudice.<sup>16</sup>

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<sup>13</sup> See *Milin Pharmacy*, 570 N.Y.S.2d at 341.

<sup>14</sup> See *id.*

<sup>15</sup> See *Calcutti*, 224 F. Supp. 2d at 697-99, 701-02.

<sup>16</sup> See *id.* If the court in *Calcutti* did intend to hold that the six-year statute of limitations applies to negligent misrepresentation claims even after a claim for fraud has been dismissed, I disagree with that conclusion. See *In re Argo Commc'ns Corp.*, 134 B.R. 776, 796 (Bankr. S.D.N.Y. 1999) ("[W]e hold that Trustee's [negligent misrepresentation] claim is timely under the six-year statute of limitations provided in CPLR § 213(8). Our holding, however, is limited to situations where negligent misrepresentation is alleged according to facts that also state a cause of action for fraud." (emphasis added)); *Ambassador Ins. Co. v. Euclid Servs., Inc.*, No. 80 Civ. 1235, 1984 WL 341, at \*4 n.7 (S.D.N.Y. May 24, 1984) (applying a six-year statute of limitations to a negligent misrepresentation

Having determined that section 213(8) does not apply to Plaintiffs' negligent misrepresentation claims relating to purchases prior to June 2001, the next question is whether section 213(1) or section 214(4) applies to those claims. New York courts have not specifically addressed when section 214(4) and when section 213(1) apply to negligent misrepresentation claims. Some guidance is provided by the New York courts' treatment of breach of fiduciary duty claims. As with negligent misrepresentation claims, if "an allegation of fraud is essential to a breach of fiduciary duty claim," the six-year statute of limitations provided by section 213(8) applies.<sup>17</sup> If an allegation of fraud is not essential to the claim, then "the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks."<sup>18</sup> Where the "remedy sought is purely monetary in nature, courts construe the suits as alleging 'injury to property' within the meaning of CPLR 214(4), which has a three-year limitations period."<sup>19</sup> Where, however, "the

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claim but noting "that were the charge of negligent misrepresentation viewed strictly in terms of negligence, that claim would be time-barred by a three year statute of limitations." (citing C.P.L.R. § 214(4)); *Fleet Factors Corp. v. Werblin*, 495 N.Y.S.2d 434, 435-36 (2d Dep't 1985) (dismissing plaintiff's fraud claim and applying a three-year statute of limitations to a negligent misrepresentation claim).

<sup>17</sup> *IDT Corp.*, 12 N.Y.3d at 139 (citation omitted).

<sup>18</sup> *Id.* (citation omitted).

<sup>19</sup> *Id.* (citation omitted).



relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies.”<sup>20</sup>

Because this rule accords with the general understanding that section 213(1) “govern[s] actions for equitable relief, not actions for damages,”<sup>21</sup> I hold that claims seeking monetary damages for negligent misrepresentations, like breach of fiduciary duty claims, are properly governed by section 214(4).<sup>22</sup> In addition, the “injury to property” language in section 214(4) has generally been interpreted broadly and has been construed to include actions alleging a decline in the value of financial instruments.<sup>23</sup> I therefore conclude that the three-year statute of limitations provided by section 214(4) governs Plaintiffs’ negligent misrepresentation claim which seeks monetary damages arising from their investment in the Lancer Funds.

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<sup>20</sup> *Id.* (citation omitted).

<sup>21</sup> *Singleton v. City of New York*, 632 F.2d 185, 190 (2d Cir. 1980) (citation omitted).

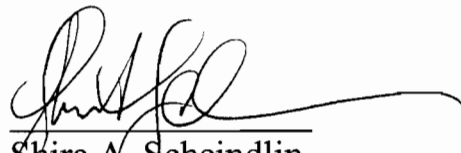
<sup>22</sup> *Cf. Fandy Corp.*, 691 N.Y.S.2d at 573 (“The plaintiff’s causes of action based on constructive fraud and negligent misrepresentation are covered by the six-year Statute of Limitations *governing equitable actions in general*.” (emphasis added) (citations omitted)).

<sup>23</sup> *See Independent Order of Foresters v. Donaldson, Lufkin, & Jenrette, Inc.*, 157 F.3d 933, 942 (2d Cir. 1998) (applying section 214(4) in a case where the plaintiff alleged losses on purchased securities due to a breach of defendant’s fiduciary duty).

#### IV. CONCLUSION

For the aforementioned reasons, Citco Defendants' motion to apply section 214(4)'s three-year statute of limitation to Plaintiffs' negligent misrepresentation claims relating to investments made prior to June 2001 is granted. Accordingly, Plaintiffs' negligent misrepresentation claims arising from misrepresentations occurring before February 12, 2001 are dismissed. The Clerk of Court is directed to close this motion (Docket No. 344).

SO ORDERED:

  
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Shira A. Scheindlin  
U.S.D.J.

Dated: New York, New York  
March 22, 2010

**- Appearances -**

**For the Plaintiffs:**

Scott M. Berman, Esq.  
Anne E. Beaumont, Esq.  
Amy C. Brown, Esq.  
Philip A. Wellner, Esq.  
Robert S. Landy, Esq.  
Lili Zandpour, Esq.  
Friedman Kaplan Seiler & Adelman LLP  
1633 Broadway  
New York, New York 10019  
(212) 833-1100

**For the Citco Defendants:**

Lewis N. Brown, Esq.  
Dyanne E. Feinberg, Esq.  
Terence M. Mullen, Esq.  
Elizabeth A. Izquierdo, Esq.  
Gilbride, Heller & Brown, P.A.  
One Biscayne Tower, 15th Floor  
2 South Biscayne Blvd.  
Miami, Florida 33131  
(305) 358-3580

Eliot Lauer, Esq.  
Michael Moscato, Esq.  
Curtis, Mallet-Prevost, Colt & Mosle LLP  
101 Park Avenue  
New York, New York 10178  
(212) 696-6000